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PURCHASABLE OFFICES IN CEDED TERRITORY

In the July number of the JOURNAL is given the decision of the Court of Claims in *Sanches v. The United States* and of the Supreme Court in *O'Reilly v. Brooke*. Both cases involve the validity of the orders of military governors in former Spanish territory abolishing offices for which a price had been paid and which the holder claimed were private property and thus under the protection of the law of nations and the treaty of peace with Spain. In the *Sanches* case the office abolished was that of "numbered procurador of the courts of first instance of the capital of Porto Rico;" in the *O'Reilly* case the office was that of high sheriff of Havana. In each case the opinion was expressed that the office had ceased with the extinction of Spanish sovereignty, but in the Supreme Court case this was not necessary to the decision, as General Brooke's liability had already been denied on other grounds, while the opinion on this point was delivered without argument of counsel, without exposition, and without the citation of authority other than that of the Secretary of War in approving General Brooke's order. It is the opinion of the writer that the holders of those offices were entitled to indemnification. The facts of the *O'Reilly* controversy will be gone into in considerable detail.

In the year 1728 Don Sebastian Calvo de la Puerta bought at public auction, with the consent of the Spanish Crown, an hereditary and alienable office known as the "alguacil mayor" or high sheriff of Havana. This was a double office — partly national, partly municipal. Its national duties were what gave the office its name and consisted principally in the service of writs. In his national character the high sheriff was an executive officer of the courts. But the patent of his office made him also a perpetual member of the city council of Havana. Connected with the perpetual councilorship apparently, and through it with the double office of high sheriff, was the right to manage and conduct the slaughter of cattle in the public slaughterhouse of Havana and to charge fees therefor. The duties

connected with this right do not seem to have been considered part of the duties of office but rather as incident to the right, which was considered one of the emoluments of the office. When considered as duties of the office, however, they have been classed as municipal and not national. For the service of writs the high sheriff was entitled to fees fixed by law.

By the law for the reorganization of the municipal councils of Cuba of July 27, 1859, it was provided that an investigation should be made as to the proper compensation for the assignable offices in the municipalities, with a view to the abolition of those offices on the payment of the compensation fixed. The office of the "alguacil mayor" of Havana, by reason of its large returns, was to be the subject of special investigation. No final action was taken under this law, however, and the high sheriff continued to be a member of the municipal council until in 1878 the governor-general of Cuba published a decree that the perpetual councilors should cease to perform the duties appertaining to them and should no longer be considered members of the municipal council, but that they should be deprived of no emolument until the proper indemnification provided for by the law of 1859 had been paid. The double office of the high sheriff was affected to the extent that he was a perpetual councilor. Other provision seems to have been made subsequently for the service of writs. At any rate, this latter function seems to have fallen to decay, so that at the time of the American occupation all that was left of the office seems to have been the right to its emoluments, which consisted of the slaughterhouse privilege. That the latter was valuable is shown by the fact that a one-half interest in it was sold on an execution sale in 1895 for \$70,000. Through the extinction of the male line of the purchaser of 1728, the office of high sheriff had passed to Count O'Reilly, the husband of the daughter of the previous high sheriff, and at the time of the American occupation the owner by inheritance was the Countess O'Reilly and Buena Vista. In performing the services connected with the slaughterhouse privileges she then employed seventy workmen, fifty men, and more than twenty carts.

The military occupation of Havana by the American forces oc-

curred January 1, 1899. The treaty of peace had been signed December 10, 1898. Ratifications were exchanged April 11, 1899. Acting on the recommendation of the Havana finance commission, General Ludlow, as governor of Havana, issued an order on May 20, 1899, terminating "the hereditary grant or privilege in connection with service of the city slaughterhouse, of which the O'Reilly family, its grantees or lessees, are now the beneficiaries," directed the city of Havana to make provision for the services in connection with the slaughterhouse, and intimated that the beneficiaries of the old privilege might seek such relief as they were entitled to in the courts. This order was to go into effect June 1. Appeal was taken to General Brooke, military governor of the island of Cuba, who did not confirm the order appealed from, but, instead, issued the following:

It being considered prejudicial to the lawful interests and general welfare of the municipality of Havana, and as a measure demanded by public policy and in harmony with preceding orders of the military government, in view of the condition of affairs created in this island by the cessation of Spanish sovereignty, the old alienated office known as "alguacil mayor de la Habana," together with all rights, duties, and privileges pertaining thereto, or derived therefrom, are hereby abolished, and the right of the claimants to ownership thereof of exercising said office or receiving any of the emoluments, attributes, prerogatives, or any kind of benefit or rights whatsoever that have heretofore been enjoyed therefrom by said claimants to ownership are hereby denied.

The municipal corporation of Havana, therefore, may adopt proper measures and provide the necessary means of performing the municipal services heretofore discharged by the claimants to ownership of said office as attributes, prerogatives, or duties attached to the same.

From this order an appeal was taken to Mr. Root, Secretary of War, who referred the matter to the Hon. Charles E. Magoon, Law Officer of the Division of Insular Affairs of the War Department. The report of Mr. Magoon was unfavorable to the petitioner, and pursuant to that report Mr. Root, December 24, 1900, made the following determination:

I can not assent to the proposition that the right to perform any part of the duties or receive any part of the compensation attached to the office of sheriff of Havana, under Spanish sovereignty, constituted a perpetual franchise which could survive that sovereignty. The fact that the Spanish Crown permitted an office to be inherited or purchased does not

make it any less an office the continuance of which is dependent upon the sovereignty which created it.

The services which the petitioner claims the right to render and exact compensation for are in substance an exercise of the police power of the State. The right to exercise that power under Spanish appointment or authority necessarily terminated when Spanish sovereignty in Cuba ended. It thereupon became the duty of the military governor to make a new provision under which this part of the power of the new sovereignty, which took the place of the sovereignty of Spain, should be exercised and the necessary service rendered to the public. The petitioner has been deprived of no property whatever. The office, right, or privilege which she had acquired by inheritance was in its nature terminable with the termination of the sovereignty on which it depended.

The question whether by reason of anything done before that time the right to compensation from the municipality of Havana has arisen is a question to be determined by the courts of Cuba.

The application for the revocation of the order heretofore made herein by the military governor of Cuba is denied.

Action was then brought in the district court for the southern district of New York against General Brooke on the ground that his order was contrary to the Constitution and laws of the United States and in violation of the provisions of the treaty of Paris and of the instructions of the President of the United States, that it was a confiscation of the plaintiff's property, and was wholly unlawful, tortious, and unauthorized on the part of the defendant, and that it was also in contravention of the Spanish law of 1859 and of the decree of 1878. Judgment was demanded for damages alleged to amount to \$250,000. Nothing was said in the complaint as to the appeal to the Secretary of War. The defendant demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action. Judge Holt, before whom the demurrer was argued, overruled it on the ground that General Brooke's order was not a governmental act; that under the Spanish law the Countess O'Reilly could not be deprived of her rights in this franchise until its value had been determined and paid to her, and that accordingly the facts as stated in the complaint amounted to a tortious interference with private property on the part of the defendant.¹

The case then came to trial, and in defense it was urged that the

¹ 135 Fed. Rep., 384.

abolition of the plaintiff's right or franchise to slaughter cattle in Havana was justified as an act under the police power in the interests of the public health, and that the United States Government having ratified the action of General Brooke in abolishing the plaintiff's franchise, the plaintiff had no longer any claim against General Brooke. The first defense, that the order was an exercise of the police power, Judge Holt refused to allow, but he upheld the second defense, that by the action of the Secretary of War and the ratification provision of the "Platt Amendment" General Brooke's order had been ratified by the Government of the United States, or of Cuba, or of both, and that this relieved General Brooke from liability, and dismissed the complaint. He expressed the opinion, however, that the plaintiff had a just claim for damages against the United States, under its obligations assumed in its treaty with Spain, or against Cuba, under its obligations assumed in its treaty with the United States, or against both Governments.²

The case was then taken up on writ of error to the Supreme Court of the United States, where the opinion was delivered by Mr. Justice Holmes.³ The court said that the plaintiff necessarily assumed that her rights followed the ancient conception of an office and were an incorporeal hereditament, susceptible of disseisin, and asked if such were the case why the disseisin was not complete before General Brooke had anything to do with the matter, or why he should be liable for the continued exclusion of the plaintiff by the United States and Cuba, but that it was hard to admit that the notion of disseisin could be applied to such disembodied rights. If not, that all General Brooke could be held for, if for anything, would be damages for the disturbance to the plaintiff while he was in power, which were not the object of the suit. But, the court continued, if the plaintiff were disseised, it would be a question whether such disseisin was a tort within the meaning of the sixteenth clause of Revised Statutes, section 563, giving the district courts jurisdiction "of all suits brought by an alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States," under which the jurisdiction of the

² 142 Fed. Rep., 858.

³ 209 U. S. 45.

district court had been invoked. Putting aside these questions, the court then proceeded to dispose of the case on its merits, basing its decision on what might be gathered from the pleadings, coupled with matters of general knowledge. Without considering then whether ratification was needed, they held in the first place that "where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States,' it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act." In the second place, they agreed "with the opinion of the Secretary of War that the plaintiff had no property that survived the extinction of the sovereignty of Spain. The emoluments to which she claims a right were merely the incident of an office, and were left in her hands only until the proceedings for condemnation of the office should be completed and she should be paid. The right to the office was the foundation of the right to the emoluments. Whether the office was or was not extinguished in the sense that it could no longer be exercised, the right remained so far that it was to be paid for, and if it had been paid for the right to the emoluments would have ceased. If the rights to the office or to compensation for the loss of it was extinguished, all the plaintiff's rights were at an end. No ground is disclosed in the bill for treating the right to slaughter cattle as having become a hereditament independent of its source. But of course the right to the office or to be paid for it did not exist as against the United States Government, and unless it did the plaintiff's case is at an end." The judgment of the district court was accordingly affirmed.

It will be noticed that the Supreme Court, in following the Secretary of War, held that the right to perform any part of the duties or receive any part of the compensation attached to the office of high sheriff of Havana ceased with the extinction of Spanish sovereignty, but that they did not specify when Spanish sovereignty became extinct. Mr. Magoon, in his report, went further and held that Spanish sovereignty passed away with the American occupation. It will be necessary to examine his position first, as the determination of the Secretary of War was based on his report without citing

authority, and the Supreme Court followed the Secretary of War, likewise without citing authority. Mr. Magoon's first contention was that the authority of complainant to administer the office of high sheriff ceased upon the establishment of the military occupation of Havana. He based this on article 6 of Lieber's Instructions for the Government of Armies of the United States in the Field, which is as follows:

All civil and penal *law* shall continue to take its usual course in the enemies' places and territories under martial law (military government), unless interrupted or stopped by order of the occupying military power, *but all the functions of the hostile government — legislative, executive, or administrative — whether of a general, provincial, or local character, cease under martial law (military government), or continue only with the sanction or, if deemed necessary, the participation of the occupier or invader.*⁴

Mr. Magoon then goes on to say:

I understand this instruction to mean that it requires an affirmative act of the invader to abrogate the civil or penal *laws*, but the authority of legislation, execution, and administration of all laws passes to the military occupant as a result of the occupation and without further affirmative act or declaration. Should he thereafter desire to confer the right to exercise any or all of said powers upon the persons previously exercising them, or other persons, an affirmative act is necessary.

From this he concludes that the authority of the claimant passed to the occupier by the fact of occupation, even though it were conceded that the office itself did not become *functus officio* thereby.

It is submitted that this interpretation of the instruction is erroneous. That Dr. Lieber did not intend it is shown by articles 26 and 39 of the Instructions, which are as follows:

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel everyone who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war — such

⁴ The italics are Mr. Magoon's.

as judges, administrative or police officers, officers of cities or communal governments — are paid from the public revenues of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

In article 26 Dr. Lieber used “expel” in the sense of “remove from office.” That this was understood by the framers of the original project for the Brussels Declaration, which was largely based on the Instructions, and which, as modified by the Brussels Conference, was in turn the basis of the Hague Regulations, is shown by paragraph 4 of that project, which is as follows:

The military authority may require the local officials to undertake on oath, or on their word, to fulfill the duties required of them during the hostile occupation; it may remove those who refuse to satisfy this requirement, and prosecute judicially those who shall not fulfill the duties undertaken by them.

If the authority of these officials ceases by the fact of occupation itself there would be no meaning to the rule that they can be removed if they refuse to take an oath of fidelity to the occupier. So article 39, in providing that those officials who continue the work of their office (functions) shall continue to be paid until the military government wholly or partially discontinues it, negatives the idea that their functions are discontinued by the occupation itself.

It seems clear, then, that the interpretation put on the sixth article is erroneous. To have warranted the interpretation placed on it, it would have had to read that functions should continue only *with the express authorization* of the occupier, instead of “only with the sanction.” The difficulty arose from Dr. Lieber’s dealing with two distinct situations in the second half of his article. If it had stopped with “cease under martial law” the contrast between the two sections of the article would have been appropriate and the article would have stated the well-settled proposition that the laws specified continue in force after occupation, unless interrupted or stopped, but that the functions of the hostile government cease for the period of the occupation through the fact of occupation itself.

But it is the functions of the hostile government, its right to direct officials in the occupied territory, which cease for the period of the

occupation, and not the functions of the local and civil officials acting only in discharge of their legal duty and independently of their government. The remainder of article 6, commencing with "or continue only with the sanction," etc., does not have much meaning unless applied to the functions of the civil officials of occupied territory acting independently of their own government, but it is clear that the contrast between the effect of occupation on the *law* of the occupied territory and on the *functions* of the hostile government applies only to the hostile government itself or its governmental officials in the territory. This distinction between officials identified with the hostile government and strictly local or civil officials will be best brought out in connection with the second contention in the report.

Mr. Magoon's second contention was that the office of high sheriff of Havana became *functus officio* by the fact of occupation. He says:

If the high sheriff of Havana was an officer of the Crown of Spain, similar in character to that of the Spanish governor-general of Cuba or the Spanish governor of the Province of Havana, it would seem unnecessary to produce argument to show that, upon the military occupation of Havana being established, the office and appurtenant rights, privileges, and authority passed away with the sovereignty upon which the office depended and of which it was an instrument, agent, or vassal. If the officers of the previous sovereignty remain in office and continue to exercise the powers derived from the previous sovereignty, wherein has the previous sovereignty been displaced?

Two propositions are assumed here which are entirely inadmissible: that sovereignty is displaced by military occupation, and that, accordingly, military occupation abrogates offices. Under the old theory of conquest it was held that on an invader acquiring firm possession of the hostile territory sovereignty over that territory and its inhabitants passed to him, subject to revestment by reoccupation or the treaty of peace. Such was the well-settled law prior to the French Revolution, and the inhabitants of the occupied territory were liable to take the oath of allegiance to the occupant and to compulsory military service in his armies. The renunciation of wars of conquest by the French people in the Constitution of 1791, however, resulted in a change of the doctrine that the inhabitants of territory

firmly occupied by the French armies became French, and this was embodied in a decision of the Court of Cassation in 1818.⁵ A decision of a similar nature emphasizing the provisional nature of military occupation until the termination of war was made some years afterwards by a German university in the case of the debts and domains of Hesse-Cassel confiscated or alienated by Napoleon the First.⁶ In 1844 this doctrine was incorporated into the work of the great German publicist Heffter. Since then it has become universally accepted by publicists of every nationality, and numerous applications of it are embodied in the Hague Regulations. Dicta embodying the old doctrine of conquest during war are to be found in *United States v. Rice*⁷ and *Fleming v. Page*,⁸ but they are merely survivals of the old doctrine and without authority to-day. The true doctrine was early expressed by Chief Justice Marshall in the case of the *American Insurance Co. v. Canter*,⁹ when he said:

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed.

As Mr. Magoon's second proposition, that the office of high sheriff became *functus officio* through the fact of occupation, was based on the proposition that the occupation displaced Spanish sovereignty, the two propositions must fall together. The exercise of sovereign power by Spain was suspended by the military occupation, but the Spanish sovereignty was not displaced until the exchange of ratifications of the treaty of peace. In fact, the position that any office is abolished by the fact of occupation alone is inadmissible. Offices exist by law, whether the law proceeds from a legislature or the executive, and the effect of military occupation may be to suspend but it does not extinguish them.

But although Spanish sovereignty was not extinguished by the

⁵ T. Ortolan, *Diplomatie de la Mer*, 1, 292.

⁶ III Phillimore, 841.

⁷ 4 Wheaton, 246.

⁸ 9 Howard, 603.

⁹ 1 Peters, 542.

military occupation, it was extinguished by the exchange of ratifications of the treaty of peace, and what the report has to say on the effect of the extinction of sovereignty on offices, while not applicable to military occupation, is applicable to the condition of affairs which arose out of the relinquishment of Spanish sovereignty in the treaty.

It will be remembered that Mr. Magoon's second contention was that if the office of high sheriff of Havana was similar in character to that of the governor-general of Cuba or to that of the governor of Havana, it passed away with Spanish sovereignty. The distinction he had in mind between offices which do not pass away with the extinction of sovereignty and those which do was based on a passage quoted by him from an opinion of the Attorney-General to the Secretary of War dated July 10, 1899. As that opinion is a valuable statement of the law on this point it will be quoted with considerable fullness.

The opinion of the Attorney-General was in reply to six questions by the Secretary of War, the first four of which are as follows:

1. Are the Spanish laws and regulations of municipalities in the dependencies of Spain now in force in Cuba as they existed at the time the island was relinquished by Spain?

2. Are the provisions of said laws and regulations, which required the assent and approval of the officers of the Crown of Spain to the various acts of the municipal authorities, now in force in Cuba?

3. Did the authority and power of said officers of the Crown of Spain, under said laws and regulations, pass to the officers of the United States now in charge of the government of civil affairs in said island, and may said authority now be exercised by said officers of the United States?

4. What direction and control over the action of the municipal authorities of Havana in the matter of engaging in the construction of public works for said city, by contract, may properly be exercised by the officers of the United States now discharging the functions of civil government in Cuba.¹⁰

In answer, the Attorney-General said:

By well-settled public law, upon the cession of territory by one nation to another, either following a conquest or otherwise, those internal laws and regulations which are designated as municipal continue in force and operation for the government and regulation of the affairs of the people of said territory until the new sovereignty imposes different laws or regu-

lations. Those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon the transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. Such laws for the government of municipalities in said territory as are not dependent on the will of the former sovereign remain in force. Such laws as require for their complete execution the exercise of the will, grace, or discretion of the former sovereign would probably be held to be ineffective under the succeeding power. So that any inchoate rights or grants made by a municipal body in Cuba while under Spanish sovereignty, which for their completion required the assent or approval of the Crown or of the Crown officers, would, in the absence of such assent or approval made prior to the treaty of cession, be ineffective and incomplete. The authority and power of the Crown and of the Crown officers in such instances did not pass to the officers of the United States, because the royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of a treaty of cession, or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide.

In other words, municipal organizations and the laws with regard to them continue after the change of sovereignty until the new government directs otherwise, while the Crown, Crown offices, and the laws with regard to them pass away with the sovereignty which created them. The latter are what the Attorney-General terms laws pertaining "to the prerogatives of the former government." They are an instance of the more general "political laws" which the Attorney-General also mentioned as abrogated by this extinction of sovereignty, and were specified because of their application to the questions which the Attorney-General was asked. As this distinction of the Attorney-General is well settled, and as it was accepted by Mr. Magoon in his report and by the War Department in its conduct of affairs in Cuba, it is not thought necessary to go into the authorities in support of it. The only question that remains is that asked by Mr. Magoon: "Was the office of high sheriff political in character, and did it pertain to the prerogatives of the Spanish Crown?" The latter part of the question might be put more succinctly in the terminology of the Attorney-General, Was he a Crown officer? Certainly not in his municipal capacity, for it was municipal officers that the Attorney-General was contrasting with Crown officers. Nor would it seem in his capacity as an officer of the courts. What the

Attorney-General meant by a Crown officer was one through whom the "will, grace, or discretion" of the Crown would be exercised or, in other words, one who was a governmental officer, representing the policy of the Crown. This would not apply to one whose only national function seems to have been the service of writs. This brings us to the distinction between political or governmental and civil officers.

The distinction is one familiar to the law of military occupation in time of war. It is there used to indicate those officers whose authority is suspended during the occupation because of the closeness of their identification with the hostile government itself. If military occupation is followed by the cession of the territory, the laws pertaining to their offices, which were suspended during the occupation, are abrogated. It was to this class that the office of governor-general of Cuba and governor of Havana belonged.

Just where the line is to be drawn between political officers and nonpolitical officers is impossible to say, but the clearest examples of nonpolitical officers are those given by Dr. Lieber in article 39 of his Instructions, already quoted, namely, "judges, administrative or police officers, officers of city or communal governments." Rivier¹¹ makes the same classification. He says:

In default of orders or instructions it would appear natural that the political functionaries, organs of the government, should retire, while the purely administrative functionaries and employees would do well not to desert their posts. * * * According to the distinction established above, prefects, subprefects, governors, etc., ought to retire; in any case their continuance in office would be most difficult. Their adhesion to the enemy occupation would strongly resemble treason. It is entirely different with municipal and communal authorities, mayors, etc., agents of police, teachers, etc.

Numerous authorities to the same effect could be cited if desirable. What is noteworthy of all of them is that municipal officers and the officers of the courts are the typical examples of nonpolitical officers. If all the functions of the high sheriff had continued to be exercised, therefore, they would have been of the typical nonpolitical class.

Nor is the position that the office of high sheriff was a nonpolitical

office weakened by anything said in the report. Probably all Spanish officers were offices of the Crown at the time the *cédulas* were issued that are cited in the report, in the sense that their creation and provision was a royal prerogative, but this does not bring them within the meaning of the rule laid down by the Attorney-General. It is true, also, that the police power is one of the highest and most despotic powers of sovereignty, and that our courts have held that it can not be alienated, but health officers are not what are called political officers. It is a familiar fact that a very large part of the police power is exercised by municipal officers and these are of all officers the ones that are nonpolitical in the sense of the law in question. The continuance of these nonpolitical officers in authority did not involve a continuance of the sovereignty of Spain. It need have meant nothing more than that the law of nations, which is a part of the law of all civilized nations, decrees that the nonpolitical laws and the nonpolitical officers under the old sovereignty shall be the laws and officers under the new sovereignty until the new sovereignty shall decree otherwise. It seems clear, therefore, that, according to the rule of the law of nations laid down by the Attorney-General, the relinquishment of Spanish sovereignty did not abrogate the office of high sheriff of Havana. Much of the same reasoning would apply to the Sanches case. The plaintiff there was an officer of the courts and therefore not a political officer.

The invalidity of the contention in the report that the office of high sheriff was abrogated by the military occupation is fatal to the proposition depending on it that the complainant should have sought relief under Article VII of the treaty of peace for injuries prior to the exchange of ratifications instead of Article VIII, which declares that the relinquishment of Spanish sovereignty should not impair private property rights, and to the proposition also depending on it that if the office were property it was property situated in the track of war and destroyed by war for which the owner was entitled to no compensation.

If, then, the slaughterhouse privilege of the Countess O'Reilly was not abrogated by the American occupation or by the extinction of the sovereignty of Spain in Cuba, was it abrogated by the order of

General Ludlow of May 20, 1899? If the reader will refer to that order he will notice that the privilege is not referred to as appurtenant to any office. The reason for this will be shown by the following quotation from the report of the Havana finance commission to General Ludlow, on the recommendation of which he had made the order:

In the larger slaughterhouse, where only cattle are killed, the commission found that the descendants of the Count O'Reilly y de Buena Vista held a monopoly on the right of carrying the dressed beef to the butcher shops, for which they were allowed to charge 50 cents a carcass. This monopoly originated in 1706 as a Crown grant to the high constable (*alguacil mayor*) of the city of Havana, as a partial payment for the services which he rendered in that office, and as a sanitary measure. This office has long ceased to exist.¹²

It is evident that the order was based on the supposition that the "concession," if ever attached to the office, had become independent of it. That the recommendation of the committee was not based on considerations of public health is shown by their statement that "the commission investigated the management of the slaughterhouses and found it businesslike and efficient" and by the fact that the city continued to employ the subcontractor to whom the concession had previously been leased. The measure was one of finance and not of police power, and the commission reported that the revenue of the city had been increased about \$10,000 a year by this change alone.

If, as was assumed in the order, the slaughterhouse privilege had been independent of the office, the legality of the order would have been open to serious question independently of the authority of the particular officer issuing the order. At best it would have amounted to the taking of a private franchise under the power of eminent domain with the unsatisfactory provision for compensation that the owners should get what relief they might in the courts. The privilege would have been somewhat similar to the private monopoly held to be property by the United States Supreme Court in the Slaughter House cases, subject to revocation without compensation under the police power but not to be arbitrarily taken from one person and granted to another. The objections to the validity of the order were

¹² Report of the War Department, Vol. I, part 3, p. 287.

sufficient to cause General Brooke, instead of confirming it, to issue a new order "in harmony" with it.

It is hard to see, however, how the privilege could have become disassociated from the office. There is no evidence that the office of high sheriff had ever been formally abolished. He had ceased to be a member of the city council by the law of 1878. Possibly also the law of civil procedure had made other provision for the service of writs; while if the duties in connection with the slaughterhouse be considered as incident to the emoluments rather than as duties of the office, he had even ceased to perform any of the duties of the office. But the right to the emoluments of the office expressly remained, and while that right remained and the office was not formally abolished it is hard to say that in a legal sense the office was extinct. Counsel for the Countess O'Reilly based their contention that the privilege had become disassociated from the office on the theory that the laws of 1859 and 1878 had abolished the office and substituted a contract between the city and the holder of the old office and his successors, whereby the latter were to continue in their slaughterhouse privileges pending indemnity. If the office was not abolished the contract theory falls with it.

The possibility of placing the abolition of the slaughtering monopoly on stronger ground than General Ludlow's order evidently became apparent to the authorities in Cuba and General Brooke's order squarely abolished the office of high sheriff itself. The language of the order would bring it under the police power, but Judge Holt, after an examination of the facts on the trial, held that it had not been issued under the police power, and as that holding has not been questioned it will be taken that the order was an exercise of the power which the United States had to reorganize government in Cuba. It will also be taken that the order was ratified by the governmental authorities of the United States and that therefore it was the act of the United States as intervening Government. In examining the order, it will be necessary to consider whether there was a right of private property to the emoluments of the office, whether General Brooke's order abolishing the office was valid, and whether any liability for indemnification resulted therefrom.

That the office or at least the emoluments of the office were private property under the Spanish law is hardly open to question. None of the provisions of the Spanish law given in Mr. Magoon's report contradict this. The royal *cédula* of October 15, 1787, quoted in the report, which declared that the incumbents of these offices were not "authorized to dispose of the same at will as any estate of their patrimony," recognized that they constituted estates, although not as freely alienable as other estates. They could be revoked at the will of the Crown subject to indemnification, and only a half interest was subject to sale on execution. If any other authority than the provisions quoted in the report are necessary, the following extract from article 336 of the civil code of Spain which was made applicable to Cuba in 1889 is conclusive:

As personal property are also considered: rents or pensions, either for life or hereditary, in favor of a person or family, * * * also purchased public offices, contracts for public services, etc.

Much other authority could be given in support of this, but it is not necessary.

That the laws with regard to the office of high sheriff, and particularly the municipal aspects of the office, remained in force after the relinquishment of Spanish sovereignty has already been shown. The same is true of the laws of property. The grant held by the Countess O'Reilly, therefore, had, even after the ratification of the treaty of peace, a double aspect: on the one hand it was a grant of public office; on the other, a grant of private property.

As to the power of the United States Government in Cuba, no better exposition of it can be given than that of the Attorney-General. In the passage already quoted he says:

The royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of a treaty of cession, or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide.

He then goes on:

Cuba, however, is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal government. In the exercise of these powers the

proper authorities of the United States may change or modify either the forms or the constituents of the municipal establishment; may, in place of the system and regulations that formerly prevailed, substitute new and different ones.

The United States had the right to reconstruct the government of Cuba. This did not result from any transfer of the political powers or royal prerogatives of the Spanish Government to the United States, but from the authority arising from the fact that the United States Government was the *de facto* government of the island. No methods of procedure in the abolition of offices which had been binding on the Spanish authorities were therefore binding on the authorities of the United States, but in exercising this undoubted authority she was bound to recognize any rights under the treaty of peace or the law of nations that were compatible with it. She was free to abolish public offices, but if those offices were also recognized as private property under the prevailing law she was bound to indemnify the holders thereof, both by the law of nations, which protects private property on cession, and the treaty of peace, which was an expression of the international rule. General Brooke's order, therefore, was valid, but the international obligations of the United States could have been satisfied only by disassociating the slaughterhouse privilege from the office and conferring it on the holders of the old office or by the payment of its value. It is submitted that the opinion of Judge Holt, that the Countess O'Reilly had "a just claim for damages for the destruction of her property, against the United States, under its obligations assumed in its treaty with Spain, or against Cuba, under its obligations assumed in its treaty with the United States, or against both Governments,"¹³ is unassailable. Likewise it would seem that the claim of Guillermo Alvarez y Sanches was just.

PERCY BORDWELL.

¹³ 142 Fed. Rep., 863.